

No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership.

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation.

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 5 - 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

EZRA Z. SHAPIRO

S. K. WALZER

540 Guardian Building

Cleveland, Ohio

and

BENJAMIN, LIEBERMAN & ELMORE

1009 Commercial Exchange Bldg.

416 West Eighth Street

Los Angeles 14, Calif.

For Appellee:

BEHRSTOCK & RUDNICK

215 West Seventh Street

Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California
Central Division

No. 3891-PH

IMPORTED LIQUORS COMPANY, a partnership,
888 Union Commerce Building, Cleveland, Ohio,
Plaintiff,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,
3315 East Vernon Avenue, Los Angeles, California,
Defendant.

COMPLAINT.

I.

Imported Liquors Company is a partnership engaged in the importing and selling of brandy, gin, rum and other liquors to the wholesale trade. Said partnership consists of two partners, namely Howard S. Bernon and Ruth B. Bernon, both of whom are citizens of the State of Ohio.

The Defendant is a corporation organized and existing under and by virtue of the laws of the State of California.

II.

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00. [2]

III.

One June 12, 1944, the Defendant, by its non-cancelable order, agreed in writing to purchase from the Plaintiff and, by its acceptance of said order, the Plaintiff sold to the Defendant fourteen hundred (1400) cases of Portuguese Suarez Brandy, upon the following terms: Ship-

ment to be made F.O.B. Atlantic Port, the Defendant to pay for said merchandise upon draft, attached to the bills of lading, at the purchase price of Forty-one Dollars and Fifty-five Cents (\$41.55) per case, less reserve for Internal Revenue Taxes and Customs Duty, at the rate of Twenty-Seven Dollars and Sixty-three Cents (\$27.63) per case, payable by the Defendant, or at a net purchase price of Thirteen Dollars and Ninety-two Cents (\$13.92) per case. As further consideration in and for said agreement of purchase and sale the Defendant issued and delivered to the Plaintiff its check in the sum of Fourteen Hundred Dollars (\$1400.00) as a deposit thereunder.

IV.

On June 14, 1944, Plaintiff received a telegram from the Defendant whereby the latter sought to cancel the aforesaid agreement. Plaintiff forthwith advised the Defendant that it would not accept, nor consent to, cancellation of said agreement. Plaintiff further states that when it presented the aforesaid check for Fourteen Hundred Dollars (\$1400.00) for payment, it was advised by the drawee therein named, that payment and acceptance of said check had been ordered stopped by the defendant, and said drawee refused to honor or accept said check for payment.

V.

Plaintiff states that it has made available, has segregated and stored in a public warehouse under warehouse receipts all of the said merchandise purchased by the Defendant, and that the Plaintiff at all times herein mentioned was and now is ready, willing and able [3] to arrange for the shipment of the said merchandise to the Defendant, or to deliver to the Defendant the said warehouse receipts,

duly endorsed and assigned, and to perform its obligations under the aforesaid agreement, and has so notified the Defendant, but the Defendant at all times herein referred to has failed and refused to perform and fulfill its obligations under its said agreement with the Plaintiff.

VI.

Plaintiff alleges that it is entitled to a judgment against the Defendant for the amount of the purchase price under the aforesaid agreement in the sum of Nineteen Thousand Four Hundred Eighty-Eight Dollars (\$19,488.00) and, in addition thereto, for all expenses incurred in the warehousing, storing and handling of said fourteen hundred (1400) cases of Suarez Brandy from June 12, 1944 until payment therefor by the Defendant, as agreed. Plaintiff states that in connection with the aforesaid fourteen hundred (1400) cases of brandy it has incurred and continues to incur, for and on behalf of the Defendant, reasonable warehousing, storing and handling charges at the rate of six cents (6¢) per case for the first month, and two and one-half cents (2½¢) per case for each month or fraction thereof, thereafter.

VII.

Plaintiff states, in the alternative, that if this Honorable Court should determine that it is not entitled to the relief requested under Paragraph VI hereof, it is entitled to judgment against the Defendant for the damages suffered by the Plaintiff as a result of the Defendant's breach of contract, all as aforesaid. Plaintiff states that the aforesaid fourteen hundred (1400) cases of Suarez Brandy are not now marketable and salable at the net price which the Defendant contracted to pay therefor, namely, Thirteen Dollars and Ninety-two Cents (\$13.92) per case. Plaintiff states that the [4] present reasonable

net market value of said brandy is Five Dollars (\$5.00) per case. By reason of all of the foregoing, this Plaintiff has been caused to suffer damages in the sum of Twelve Thousand Four Hundred Eighty-Eight Dollars (\$12,488.00) and in addition thereto a sum equal to the reasonable warehousing, storing and handling charges, as aforesaid.

Wherefore, Plaintiff prays that (1) the Defendant be required to perform its aforesaid agreement and, simultaneously with the Plaintiff's delivery unto the Defendant of the warehouse certificates covering the aforesaid fourteen hundred (1400) cases of Suarez Brandy, to pay unto the Plaintiff the sum of Nineteen Thousand Four Hundred Eighty-Eight Dollars (\$19,488.00), plus a sum equal to the warehousing, storing and handling charges as hereinabove set forth; or (2) in the alternative, that Plaintiff have judgment against the Defendant in the sum of Twelve Thousand Four Hundred Eighty-eight Dollars (\$12,488.00), plus a sum equal to the warehousing, storing and handling charges, as aforesaid, as damages sustained by the Plaintiff by virtue of the Defendant's aforesaid breach of contract; and (3) that the Plaintiff have judgment against the Defendant for the appropriate amount of interest at the rate of six per cent (6%) per annum from June 12, 1944 in connection with either item 1 or item 2 of the within prayer; and (4) that the costs of this action be taxed against the Defendant.

EZRA Z. SHAPIRO and S. K. WALZER
and

BENJAMIN, LIEBERMAN & ELMORE,

By Aaron Elmore

Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 22, 1944. [5]

[Title of District Court and Cause.]

ANSWER

Comes now the Los Angeles Liquor Company, Inc., a corporation, and answering plaintiff's complaint, admits, denies and alleges as follows:

I.

Answering paragraph I, defendant has no information or belief concerning the allegations contained in the first paragraph of paragraph I, and basing its answer upon such lack of information and belief, generally and specifically denies each and every allegation contained therein.

II.

Generally and specifically denies each and every allegation contained in paragraph III of plaintiff's complaint. [6] and in that connection alleges that defendant never executed any non-cancelable order, and that plaintiff never accepted any order executed by defendant, and further alleges that no agreement was ever entered into between the plaintiff and defendant, except that this defendant did make an offer to purchase certain brandy from plaintiff and mailed a check in the sum of \$1400.00 to the plaintiff, together with said offer.

III.

Answering paragraph IV of plaintiff's complaint the defendant generally and specifically denies each and every allegation contained therein, except that defendant alleges that on June 14, 1944 defendant canceled the offer above mentioned, and stopped payment on the aforesaid check of \$1400.00.

IV.

Answering paragraph V of plaintiff's complaint, the defendant generally and specifically denies each and every

allegation contained therein, and in that connection alleges that there was no agreement between the parties hereto.

V.

Answering paragraph VI of plaintiff's complaint the defendant generally and specifically denies each and every allegation contained therein, and in that connection denies that the plaintiff is entitled to a judgment in the sum of \$19,488.00, or any other sum, or at all; and further denies that plaintiff has incurred any expense of any nature on behalf of this defendant.

VI.

Answering paragraph VII of plaintiff's complaint the defendant generally and specifically denies each and every allegation therein contained, and further denies that the [7] plaintiff has been damaged in the sum of \$12,488.00, or any other sum, by reason of any acts of this defendant.

VII.

As a further defense to the complaint defendant alleges that said complaint fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for judgment against the plaintiff; that plaintiff take nothing by its complaint, and that said complaint be dismissed; that defendant have judgment against plaintiff; for costs of suit incurred in this action; and for such other and further relief as to the Court seems just.

BEHRSTOCK & RUDNICK

By Ben H. Rudnick

Attorneys for Defendant

[Title of District Court and Cause.]

INTERROGATORIES TO DEFENDANT UNDER
RULE 33

To the defendant and to Behrstock & Rudnick, Esqs., its attorneys:

Plaintiff requests the defendant corporation, or some officer competent to testify in its behalf, to answer in writing, under oath, within the time allowed by law the following interrogatories under Rule 33 of the Rules of Civil Procedure for the District Court of the United States: [9]

1. State the connection, if any, of Irven Rose to Los Angeles Liquor Company, Inc., a corporation, defendant, on June 12, 1944, and include in the answer his connection, if any, as officer, director, stockholder and as employee.

2. State the connection, if any, of Irven Rose to Los Angeles Liquor Company, Inc., a corporation, defendant, on June 13, 1944, and include in the answer his connection, if any, as officer, director, stockholder and as employee.

3. State the connection, if any, of Irven Rose to Los Angeles Liquor Company, Inc., a corporation, defendant, on June 14, 1944, and include in the answer his connection, if any, as officer, director, stockholder and as employee.

4. State his duties on or about June 12, 1944.

5. Was Mr. Irven Rose authorized to make purchases of liquor on behalf of the corporation on June 12, 1944?

6. Was Mr. Irven Rose authorized by the corporation, either expressly or impliedly, by virtue of his connection

with the corporation to sign the purchase order dated June 12, 1944, a copy of which is attached hereto, marked "Exhibit A"?

7. Was Mr. Irven Rose authorized by the corporation to sign the corporation's check No. 6565, a copy of which is attached hereto and marked "Exhibit B"?

8. Did the corporation, or anyone connected with it, receive the letter from Imported Liquors Company, dated June 5, 1944 in the regular course of mail after June 5, 1944, a copy of which letter is attached hereto, marked "Exhibit C"?

9. Was the letter mentioned in question No. 8 referred to Aaron Lilien or Irven Rose for attention?

10. If so, to whom?

11. Was there any reason for endeavoring to cancel the purchase order dated June 12, 1944 (Exhibit A) by the telegram dated June 14, 1944, a copy of which is attached hereto, marked [10] "Exhibit D", other than the reasons there set forth, to wit: "Irven Rose . . . sold his interest in Los Angeles Liquor Company?"

12. If so, what was such other reason or reasons?

Dated: November 24, 1944.

EZRA Z. SHAPIRO and S. K. WALZER

and

BENJAMIN, LIEBERMAN & ELMORE,

By Aaron Elmore

Attorneys for Plaintiff.

[Note: Exhibit A is the same as Exhibit A to deposition of Howard S. Bernon which will be found at page 54 so is not repeated at this point.]

[Note: Exhibit B is the same as Exhibit B to deposition of Howard S. Bernon which will be found at page 55 so is not repeated at this point.]

[Note: Exhibit C is the same as Exhibit C to deposition of Howard S. Bernon which will be found at page 57 so is not repeated at this point.]

[Note: Exhibit D is the same as Exhibit D to deposition of Howard S. Bernon which will be found at page 58 so is not repeated at this point.]

Received copy of the within Interrogatories and also Notice of Taking Deposition this 27th day of Nov. 1944. Ben H. Rudnick, Attorneys for Defendant.

[Endorsed]: Filed Jan. 15, 1945. [11]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PRESENTED
BY PLAINTIFF UNDER RULE 33

State of California
County of Los Angeles—ss:

Aaron Lilien, being first duly sworn, deposes and says: That he is the President of defendant Corporation, and herewith answers the Interrogatories propounded by plaintiff under Rule 33. That said answers are true and correct of his own knowledge. That the numbers below

set forth are the numbers of the Interrogatories, which are immediately followed by the answer:

- 1—Stockholder and Secretary.
- 2—Stockholder and Secretary.
- 3—Stockholder and Secretary. [16]
- 4—Charge of Sales.
- 5—Yes.
- 6—Yes.
- 7—Yes.
- 8—Yes.
- 9—Yes.
- 10—Both.
- 11—Yes.

12—There was still some doubt in our minds whether there would not be some trouble about passing the Brandy with the California authorities, and I decided that it was too much Brandy to order, in view of the fact that Mr. Rose was leaving the Company.

AARON LILIEN

Subscribed and sworn to before me this 8th day of December, 1944.

(Seal)

BEN H. RUDNICK

Notary Public in and for the County of Los Angeles,
State of California. [17]

[Endorsed]: Filed Jan. 15, 1945. [18]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To the Plaintiff, and to Ezra Z. Shapiro and S. K. Walzer, and Benjamin, Lieberman & Elmore, Plaintiff's Attorneys:

You and each of you will please take notice that on Monday the 22nd day of January, 1945 at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, in the court room of the Honorable Pierson M. Hall, in the Federal Building at Temple & Spring Streets, Los Angeles, California, the defendant will move the Court for a summary judgment in the above entitled action.

Said motion will be made on the grounds set forth in the Statement of Grounds and Points and [19] Authorities attached hereto, and will be based upon the affidavits of Irven Rose, Aaron Lilien and M. D. Weiner which affidavits are also attached hereto; and will further be based upon the papers and documents in the file of the above entitled case.

Dated this 10th day of January, 1945.

BEHRSTOCK & RUDNICK

By Ben H. Rudnick

Attorneys for Defendant [20]

[Title of District Court and Cause.]

STATEMENT OF GROUNDS AND POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

Defendant's purchase order of June 12, 1944, upon which the complaint in this case is based, was subject to acceptance by plaintiff. This was the understanding between the defendant and plaintiff's agent, and also the general custom and usage in the liquor trade as appears by affidavits filed herewith. This was also the plaintiff's understanding of the transaction as appears on page 2, lines 2 and 3 of the complaint, to-wit, "and by its acceptance of said order the plaintiff sold to the defendant", etc.

The order, therefore, was merely an offer which would become a binding agreement only when accepted by the offeree (plaintiff) and the acceptance communicated or put in the [21] course of communication to the offeror (defendant).

Plaintiff received defendant's telegram canceling the order on June 14, 1944 (page 2, line 18 of complaint) and this was before any acceptance was communicated or put in the course of communication to defendant by plaintiff.

Therefore, as a matter of law, there never was a completed agreement of purchase and sale between the parties and plaintiff has no cause of action.

Points and Authorities.

1—An order for goods or chattels is merely an offer to buy and not a contract to sell or purchase.

H. D. Taylor & Co. -vs- Jonas, 118 CA 208—4
P 2nd, 497

Harvey -vs- Duffy, 99 Cal. 401—33 P. 897

Durant-Dort Carriage Co. -vs- Karth, 14 Oh Circ.
Ct. NS 341, 33 Oh Circ Ct. 343.

55 C. J. 81 (Sales Sec. 45)

6 Cal. Jur. 52

46 Amer. Juris, 245

2—An order or offer is revocable at any time before acceptance or approval is communicated to the proposed buyer or offeror.

Calif. Civil Code, Sec. 1586

Harvey -vs- Duffy (supra)

Durant-Dort Carriage Co. -vs- Karth (supra)

6 Cal. Jur. 51

9 Ohio Juris 261

Baird, et al. -vs- Pratt, et al., 148 Fed. 825.

BEHRSTOCK & RUDNICK

By Ben H. Rudnick

Attorneys for Defendant [22]

[Title of District Court and Cause.]

AFFIDAVIT OF IRVEN ROSE IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

State of California

County of Los Angeles—ss:

Irven Rose, being first duly sworn, deposes and says: That the following facts are within his personal knowledge, and if he is called as a witness in the above entitled action he can and will testify competently thereto.

That on June 12, 1944 he was a stockholder and secretary, and in charge of sales of Los Angeles Liquor Company, Inc., a corporation, and defendant herein.

That he has been engaged on the wholesale trade of wines, beers and liquors in the State of California for the past ten years. That it has always been the custom and usage in said trade that any and all orders [23] for wines, beers and liquors should be in writing, signed by the buyer and subject to acceptance by the seller, either by written confirmation or by actual shipment of the merchandise.

That on the evening of June 12th, 1944 affiant signed the written order referred to in plaintiff's complaint on behalf of the defendant. That a true and correct copy of said order is attached hereto, marked "Exhibit A". That at the same time he also signed a deposit check in the sum of \$1400.00 in connection with said order. That he then handed said order to M. D. Weiner, agent of

the plaintiff, for transmittal to plaintiff. That affiant was then advised by said M. D. Weiner that shipment would probably be expected when his principal confirmed the order and receipt of the deposit check.

That said M. D. Weiner has never been employed by the Los Angeles Liquor Company either as agent, or employee and has never been authorized by the Los Angeles Liquor Company to make any commitments or sign any documents on its behalf.

That affiant knows of his own knowledge that no confirmation of said order was ever received from plaintiff either on June 14, 1944 or any date prior thereto, and that no communication confirming said order and post dated June 14, 1944, or any date prior thereto was ever received by defendant corporation.

That affiant is no longer connected with defendant corporation in any way.

IRVEN ROSE

Affiant

Subscribed and sworn to before me this 10th day of January, 1945.

(Seal)

BEN H. RUDNICK

Notary Public in and for said County and State [24]

[Note: Exhibit A is the same as Exhibit A to the deposition of Howard S. Bernon which will be found at page 54 so is not repeated at this point]

[Title of District Court and Cause.]

AFFIDAVIT OF AARON LILIEN IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

State of California

County of Los Angeles—ss:

Aaron Lilien being first duly sworn deposes and says:
That the following facts are within his personal knowledge, and if he is called as a witness in the above entitled action he can and will competently testify thereto:

That he is President of defendant Los Angeles Liquor Co., Inc., a corporation. That he has been engaged in the wholesale trade of wines, beers and liquors for the past five or six years. That he participated in the negotiations for the order involved in this case with M. D. Weiner, agent of plaintiff. That he was advised by said agent that any order for plaintiff's merchandise was to be executed in writ- [26] ing and submitted to plaintiff for approval and acceptance. That it is the general custom and usage in the liquor trade that all orders should be in writing, signed by the buyer and subject to acceptance by the seller, either by written confirmation or actual shipment;

That in the morning or noon of June 14, 1944 affiant advised Mr. Weiner that he desired to cancel the order of June 12, 1944 because Mr. Irvan Rose, who was then an officer, stockholder and sales manager of defendant corporation was severing his connections with the corporation and also because affiant was worried about the

brandy passing California authorities. That Mr. Weiner advised affiant to wire in his cancelation to the Company before the order was confirmed. That affiant did immediately telegraph a cancelation of the order to the Company, and stopped payment of the deposit check. That a true copy of said cancelation wire is attached hereto, marked "Exhibit A";

That defendant corporation did not receive any notice of acceptance of said order on June 14th, 1944 or any day prior thereto, and did not thereafter receive any written notice of acceptance of said order either dated or postmarked on June 14, 1944 or any day prior thereto;

That M. D. Weiner has never been employed by defendant corporation as agent, servant or employee; and never had any authority, written or otherwise, to make any commitments on behalf of defendant corporation.

AARON LILIEN

Affiant

Subscribed and sworn to before me this 10th day of January, 1945.

(Seal)

BEN H. RUDNICK

Notary Public in and for said County and State [27]

[Note: Exhibit A is the same as Exhibit D to deposition of Howard S. Bernon which will be found at page 58 so is not repeated at this point.]

[Title of District Court and Cause.]

AFFIDAVIT OF M. D. WEINER IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

State of California

County of Los Angeles—ss:

M. D. Weiner being first duly sworn, deposes and says: That the following facts are within his personal knowledge, and if called as a witness on the trial of this action he can and will competently testify thereto.

That affiant has been a sales agent of imported wines, brandies and liquors for various companies for a period of approximately ten years in various states of the United States, including the State of California. That he was the sales agent for the plaintiff in connection with the transaction involved herein. That he took the purchase order, a copy of which is attached hereto marked "Exhibit [29] A", from defendant on behalf of the plaintiff for the purpose of transmitting the same to the plaintiff.

That affiant advised the defendant that said purchase order was subject to acceptance by the plaintiff upon plaintiff's receipt of a properly executed order in writing accompanied by a deposit check. It has always been the custom and usage in the liquor trade in California and in other states, that all orders taken by a salesman are subject to acceptance by the principal either by written confirmation or by actual shipment of the merchandise, and all of affiant's dealings with defendant in connection with this transaction and all other transactions has been on that basis.

That affiant has had other dealings with defendant in the purchase and sale of liquors, but has never been employed by defendant either as agent, servant or employee, and has never had any authority to make any commitments or sign any documents on behalf of the defendant.

That affiant affixed his name to the above mentioned purchase order after he had received it from defendant and only for the purpose of identifying himself with the order on plaintiff's records as the salesman who sent it in. That all communications between this affiant and plaintiff were carried on by affiant as plaintiff's salesman, and without the consent or knowledge of defendant.

That on June 14, 1944 Mr. Lilien, who represents the defendant corporation, advised affiant that he desired to cancel aforementioned order. That affiant advised Mr. Lilien to wire his cancelation to plaintiff before plaintiff confirmed the order, because affiant had no authority to bind his principal either in taking the order or the cancelation.

M. D. WEINER

. Affiant [30]

Subscribed and sworn to before me this 10th day of January, 1945.

(Seal)

BEN H. RUDNICK

Notary Public in and for the County of Los Angeles.
State of California [31]

[Note: Exhibit A is the same as Exhibit A to the deposition of Howard S. Bernon which will be found at page 54 so is not repeated at this point.]

[Endrosed]: Filed Jan. 12, 1945.

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION

To the Defendant and to Behrstock & Rudnick, Esq., its attorneys:

Please Take Notice that the plaintiff desires to take the deposition of Howard S. Bernon, one of the partners of the plaintiff herein upon oral examination under the provisions of Rule 30 of the Rules of Civil Procedure for the District Court of the United States, and the deposition of said witness will be taken on Wednesday, December 20, 1944, at 3:00 o'clock P. M. of said day, at the office of Ezra Z. Shapiro and S. K. Walzer, 540 Guardian Building, Cleveland, Ohio, before a Notary Public. [34]

The address of said Howard S. Bernon is 888 Union Commerce Building, Cleveland, Ohio.

You will further take notice that the Notice of Taking Deposition on Friday, December 8, 1944 of said witness is hereby withdrawn, and this notice is substituted therefor.

Dated: December 5, 1944.

EZRA Z. SHAPIRO and
S. K. WALZER

and

BENJAMIN, LIEBERMAN & ELMORE,
by Aaron Elmore
Attorneys for Plaintiff.

Received copy of the within notice this 5th day of December, 1944. Ben H. Rudnick, Attorney for Defendant. [35]

[Title of District Court and Cause.]

Deposition of Howard S. Bernon, taken before me, the undersigned, Harry Herman, a Notary Public in and for the State of Ohio, on Tuesday, the 19th day of December, 1944, beginning at 4:00 o'clock p. m., in the offices of E. Z. Shapiro and S. K. Walzer, 540 Guardian Building, Cleveland, Ohio, pursuant to the annexed notice and stipulations of counsel for the respective parties herein; said deposition to be read in evidence on behalf of the Plaintiff, upon the trial of the above entitled cause. [36]

Appearances:

On behalf of the Plaintiff:

Samuel K. Walzer, Esq., of Cleveland, Ohio.

On behalf of the Defendant:

Morton S. Zaller, Esq., Leader Building, Cleveland, Ohio.

Stipulations

It is stipulated and agreed by and between counsel for the respective parties herein, that this deposition may be taken in shorthand by Harry Herman, a shorthand reporter, and by him transcribed into typewritten manuscript in the absence of the witness.

Mr. Walzer: Let the record show that counsel for the defendant has agreed to stipulate to the taking of the within deposition on December 19th, 1944, at 4:00 o'clock p.m., instead of on December 20th, 1944, at 3:00 o'clock p.m., as set forth in the original notice attached hereto.

Mr. Zaller: I am waiving the date and time specifically and to the method of taking it. There cannot be an objection, because you served a notice in accordance with the law. We were represented by counsel.

The defendant reserves the right to object [37] to the relevancy and materiality and competency of any of the evidence offered at the taking of this deposition, in addition to any objection that may be made during the taking of the deposition.

HOWARD S. BERNON,

of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

Direct Examination

of Howard S. Bernon by Mr. Walzer:

Q. What is your name? A. Howard S. Bernon.

Q. And your address?

A. Hotel Carter, Cleveland, Ohio.

Q. What is your occupation, Mr. Bernon?

A. Managing partner of Imported Liquors Company.

Q. What is the Imported Liquors Company?

A. Imported Liquors Company is a concern which imports liquors from various countries and sells them at wholesale to jobbers and to monopoly states in the United States.

Q. Who are the members of this partnership?

A. Myself and Mrs. Ruth B. Bernon.

Q. Ruth B. Bernon is your wife? [38]

A. Yes.

Q. Is she a resident of Ohio?

A. She also resides at the Hotel Carter.

Q. In Cleveland, Ohio? A. Cleveland, Ohio.

Q. What is your office address?

A. 888 Union Commerce Building, Cleveland, Ohio.

Q. How long have you been in the liquor business, Mr. Bernon?

A. In the liquor business since 1934.

(Deposition of Howard S. Bernon)

Q. Please tell us what your experience has been in this business?

A. From 1934, when repeal came back I entered into business with a concern which operated under the name of the Distillers Brewers Products Corporation in Jersey City. I worked for them in their plant and in their business, various departments, shipping department. In fact, in about every capacity. Then I was transferred to New York City. I worked in the New York City sales office. I was then transferred to Ohio, where I was assistant Ohio sales manager for that concern. In 1935 I left them and organized the Howard Bernon Company, which was a company engaged in representing various distillers and importers in the State of Ohio.

Q. Is that a corporation?

A. It was an Ohio corporation. Howard Bernon Company also [39] imported various wines. We represented such concerns as 21 Brands, Inc., F. C. G. Importers, Inc., Jacquin Cordial Company, Fairfax Distillery Company, Kolmar Company, and other companies of that type, besides doing our own trading and importing. I organized the Imported Liquors Company in May, 1942. Since that time I have been the managing partner of that concern. In other words, I have been engaged in the liquor business since repeal. I have been engaged in every phase of the business.

Q. Am I correct in assuming, Mr. Bernon, from 1934 on you were engaged in business as the Howard S. Bernon Company?

A. It was the Howard Bernon Company. No. "S" in it.

(Deposition of Howard S. Bernon)

Q. Have you had occasion to do any traveling in connection with your activities in the liquor business?

A. I went to Europe in 1937 and studied the wine situation over there, visiting all the leading distillers and distributors in France. And since I have been the managing partner of Imported Liquors Company I have made trips to Mexico City.

Q. Are you acquainted with the United States market with reference to liquors, both imported and domestic?

A. I would definitely say yes. I have been in every state in the Union with the exception of two, in the course of my business.

Q. What two were they? [40]

A. North Carolina. Incidentally, that is one we do business in. The other one is Maine.

Q. To whom do you sell your liquor, generally speaking?

A. Wholesalers and state monopolies. We sell ten or eleven of the state monopolies. Some of our merchandise is also sold for consumption in Alaska.

The following exhibits were marked by the Notary.

Plaintiff's Exhibit A, letter dated June 12, 1944.

Plaintiff's Exhibit B, check dated June 12th, 1944, B1 and B2, slips attached thereto.

Plaintiff's Exhibit C, copy of letter dated June 5th, 1944, to the Los Angeles Liquor Company, Inc.

Plaintiff's Exhibit D, telegram dated June 14th, 1944, signed Aaron Lilien.

Plaintiff's Exhibit E, Letter of Los Angeles Liquor Company, Inc., dated May 20th, 1944.

(Deposition of Howard S. Bernon)

Plaintiff's Exhibit F, copy of letter dated June 29th, 1944, from Imported Liquors Company to Los Angeles Liquor Company, Inc.

Plaintiff's Exhibit G, letter dated June 7th, 1944, from M. D. Weiner to Imported Liquors Company.

Plaintiff's Exhibit H, telegram dated June 7th, from M. D. Weiner to Imported Liquors Company.

Plaintiff's Exhibit I, Food & Drug Inspection station, [41] dated May 15, 1944.

Plaintiff's Exhibit J, telegram dated June 5, from M. D. Weiner to Imported Liquors Company.

By Mr. Walzer:

Q. Did you use salesman in the distribution and sale of your merchandise?

A. Salesmen and agents.

Q. Who is Mr. M. D. Weiner?'

A. Mr. M. D. Weiner was for a time an agent of our company, and also an agent of the Los Angeles Liquor Company.

Q. Handing you what has been marked for the purpose of identification Plaintiff's Exhibit E, I will ask you if you received that latter from the Los Angeles Liquor Company? A. I did.

Q. Can you tell us about when you received this letter?

A. I received this letter about May 28th approximately. I was in New York at the time it reached my office, and the copy was forwarded to me in New York.

(Deposition of Howard S. Bernon)

Q. What, if anything, did you do with reference to that letter?

A. Well, first of all I had—I had a long distance 'phone call put in to Mr. Aaron Lilien in Los Angeles, in which I discussed this letter. I told him we had a shipment of brandy of which there originally were 1500 cases, of which there was 1400 left available for sale. That it had been [42] passed by the Food and Drug Administration of the United States Government, and, therefore, could meet all the requirements of his letter of May 20th. I further told him that I could send him a photostat of this, and that it would not be necessary for the merchandise to be reexamined in California by any Federal or State authorities that they had. I then, having hung up the 'phone, had a photostat made and wrote him a letter in which I confirmed our telephone conversation.

Q. Handing you what has been marked Plaintiff's Exhibit C for the purpose of identification, I ask you if that is a true copy of the letter which you addressed to Mr. Aaron Lilien on June 5th, 1944?

A. It absolutely is.

Q. Handing you what has been marked for identification Plaintiff's Exhibit I, I ask you if that is the original of which you sent a photostatic copy to Mr. Aaron Lilien of the Los Angeles Liquor Company, Inc., on June 5th, 1944?

A. It is.

Q. And did that approval cover the brandy which was the subject matter of the conversation with Mr. Lilien?

A. Yes, sir. It is the only lot of brandy we discussed.

(Deposition of Howard S. Bernon)

Q. Handing you what has been marked for identification Plaintiff's Exhibit G, I will ask you if you received [43] that letter from Mr. M. D. Weiner?

Mr. Zaller: I will object at this point to the testimony regarding the letter and the introduction of the letter as an exhibit.

Q. Answer the question.

A. I received this letter from Mr. Weiner.

Q. Handing you what has been marked for the purposes of identification Plaintiff's Exhibit H, a wire from M. D. Weiner, addressed to Imported Liquors Company, dated June 7th, 1944, I will ask you if you received this wire from Mr. Weiner?

Mr. Zaller: At this point I object to any testimony regarding this exhibit or to the introduction of the exhibit.

A. I did receive it.

Q. Handing you what has been marked for the purposes of identification Plaintiff's Exhibit A, I will ask you if you received this letter from the Los Angeles Liquor Company, Inc., dated June 12th, 1944, and signed by Irven Rose? Did you receive the letter?

A. Yes, sir.

Q. What, if anything, did you do, Mr. Bernon, after receiving Plaintiff's Exhibits G and H—

A. I immediately wired Mr. Weiner asking for shipping instructions. I sent the wire on June 9th. [44]

Q. —to confirm the sale—

Mr. Zaller: Just a minute. I want to object to each question regarding this letter, and may we stipulate that my objection stands as though it were repeated to each question regarding those exhibits. Is that all right?

(Deposition of Howard S. Bernon)

Mr. Walzer: Yes, certainly.

Q. And in this wire which you sent asking for shipping instructions you, of course, confirmed the sale of the brandy to the Los Angeles Liquor Company, Inc?

A. Naturally.

Mr. Zaller: May I have that last question and answer clarified.

(Last question and answer read. Colloquy ensued.)

Q. Did you receive the \$1400 check referred to in Exhibit A? A. Yes, sir.

Q. Handing you what has been marked for the purposes of identification Plaintiff's Exhibit B, I ask you if that is the check in the sum of \$1400 made payable to the Imported Liquors Company, by the Los Angeles Liquor Company, Inc., which you received together with the letter marked Exhibit A?

A. That is the exact check. It is marked "deposit on 1400 cases Suarez Brandy." So I did.

Q. What did you do with this check upon receiving it?

A. I took the—or rather sent the check over to the [45] Manufacturers Trading Corporation, our commercial bankers.

Q. Handing you what has been marked for identification, Plaintiff's Exhibit B-1, I will ask you if your bankers, the Manufacturers Trading Corporation, received a notice from the Central National Bank of Cleveland to the effect that payment had been stopped by the Los Angeles Liquor Company, Inc., on the check identified as Plaintiff's Exhibit B? A. Yes.

Q. Handing you what has been marked for identification as Plaintiff's Exhibit B-2, I ask you if that is the

(Deposition of Howard S. Bernon)

notification which the Bank of America sent to the Central National Bank of Cleveland, advising them of the stop payment order on Plaintiff's Exhibit B?

A. Yes; it is.

Q. Handing you what has been marked for identification, Plaintiff's Exhibit D,—(Exhibit D handed to Mr. Zaller by Mr. Walzer)—and I ask you if you received this wire dated June 14th, 1944, sent by Aaron Lilien of the Los Angeles Liquor Company to the Imported Liquors Company? A. I did.

Q. Which did you receive first, Mr. Bernon, the letter of June 12th, identified as Plaintiff's Exhibit A, or the wire identified as Plaintiff's Exhibit D?

A. I received them both on the same day, but the letter came [46] about three or four hours before the wire. I remember this because it was a confirmation one minute and cancellation the next.

Q. What, if anything, did you do after receiving the wire of cancellation identified as Plaintiff's Exhibit D?

A. We wrote a letter on June 29th, to the attention of Mr. Aaron Lilien, expressing our amazement at his so-called cancellation. We also at that time suggested that he go through with his part of the deal as originally contracted for.

Q. Handing you what has been marked for the purposes of identification, Plaintiff's Exhibit F, I will ask you if that is a true copy of the letter dated June 29th, 1944, which you addressed to the Los Angeles Liquor Company, Inc., attention Mr. Aaron Lilien?

A. It is.

(Deposition of Howard S. Bernon)

Q. Now, Mr. Bernon, you have stated earlier in this deposition that you have had a great deal of experience in the liquor business. Will you tell us what is meant by the so-called expression "liquor holiday"?

Mr. Zaller: At this time I want to object to any testimony by Mr. Bernon as an expert on any subject not concerned with this lawsuit.

Q. Even though you are an expert, would any one in the trade know what is meant by a "liquor holiday," Mr. Bernon? [47]

A. Yes. The "liquor holiday" was merely a holiday granted by the W. P. B., that is the War Production Board, to allow all distillers of the United States to produce spirits for beverage purposes for one month. Whereas for about, oh, around two years they were not permitted to manufacture any spirits except for the United States Government.

Q. What kind of beverages would these spirits produce?

A. To make gin, whiskey. Used to make—to blend neutral spirits with whiskeys.

Q. Would not be used for brandy; would it?

A. No, sir.

Q. About when was the trade made aware of the fact that there was to be such a liquor holiday?

A. June 13th.

Q. Of what year?

A. 1944. There had been talk about it on and off for approximately six weeks prior to that time. There had been a lot of speculation in the papers, such as the New York Journal of Commerce and New York Times; papers of that kind in addition to the trade papers.

(Deposition of Howard S. Bernon)

Q. What was the effect, if any, of the so-called liquor holiday upon the marketability of the type of imported brandy which you had sold to the Los Angeles Liquor Company?

A. Well, naturally it reduced the sales on all imported merchandise, especially brandy. Brandies had been used for [48] the past two years, more or less as a substitute for domestic whiskeys which were not available. While there had always been a certain amount of brandy consumed in the United States, it was an exceedingly heavy supply that the country had used for substitution. Of course, with the coming of domestic whiskeys in the market, it would reduce the sales of brandy.

Q. Would the market value of the brandy drop or increase as the result of the liquor holiday?

A. Decrease.

Mr. Zaller: I want to reiterate my objection to all questions that call for Mr. Bernon testifying as an expert. May we stipulate that?

Mr. Walzer: You certainly may.

Mr. Zaller: That my objection is a continuing one to the successive questions.

Mr. Walzer: Let the record show that certain of the questions which may be propounded by counsel for the plaintiff do not require the opinion of an expert. As to those which do require the opinion of an expert, counsel for the plaintiff states that he has duly qualified Mr. Bernon as an expert in this field.

Q. Now, as a matter of fact, I don't want your opinion, Mr. Bernon. What is the fact as to whether or not the liquor [49] holiday depressed the market value

(Deposition of Howard S. Bernon)

of imported brandies such as you had for sale and sold to the Los Angeles Liquor Company, Inc?

A. It definitely did.

Q. What is the present reasonable market value of such imported brandies? A. Today?

Q. Today.

A. Approximately \$2 per case in bond.

Mr. Zaller: I object to that question.

Q. Is that price net or gross?

A. It is net. That does not include Federal taxes or import duty.

Q. What was the reasonable market value of imported brandy such as was the subject matter of the sale to the Los Angeles Liquor Company on September 22nd, 1944?

A. At that time it was approximately \$5 per case in bond.

Q. And did that or did not that include Federal taxes?

A. It did not. When I say in bond it does not include any Federal taxes or import duties.

Q. Are you prepared to deliver to the Los Angeles Liquor Company 1400 cases of imported brandy, Suarez brandy I believe you call it, which was the subject matter of your agreement with them?

Mr. Zaller: I object.

A. I am. [50]

Mr. Zaller: I object to the question as being too general.

A. I am ready to deliver the brandy to them, and have been ready to deliver it any day since June 5th they desire to receive the merchandise.

Q. Is this brandy segregated? A. Yes, sir.

(Deposition of Howard S. Bernon)

Q. Where is it?

A. In the Rockefeller Center Warehouse, 630, 5th Avenue, New York City.

Q. What is the fact as to whether or not you incurred any warehouse or storing or handling charges with reference to the segregation of the said 1400 cases of Suarez brandy?

A. Well, the warehouse naturally charges warehouse charges. And they have a flat rate which is $3\frac{1}{2}$ cents in and $2\frac{1}{2}$ cents a month thereafter.

Q. What is that, per case, per bottle or what?

A. That is per case.

Q. As I understand it, you mean you have to pay $3\frac{1}{2}$ cents per case when you first store it, and then pay $2\frac{1}{2}$ cents per month per case thereafter?

A. Yes; and including the first month. The $2\frac{1}{2}$ cents charge starts the first month.

Mr. Zaller: $2\frac{1}{2}$ per month?

A. $3\frac{1}{2}$ in, and then $2\frac{1}{2}$ per case every month starting [51] with the first month.

Q. So then the total charges for the first month would be six cents per case, and after that $2\frac{1}{2}$ cents per case per month? A. That's correct.

Q. Has the defendant, the Los Angeles Liquor Company, Inc., at any time, since the receipt of the wire of cancellation by you, offered to accept the 1400 cases of Suarez brandy which it bought from you?

A. They have not.

Q. 1400 cases of Suarez is still in the warehouse?

A. It is.

Mr. Walzer: The plaintiff offers in evidence Plaintiff's Exhibits A, B, B-1, B-2, C, D, E, F, G, H and I.

(Deposition of Howard S. Bernon)

Mr. Zaller. Defendant objects to Exhibits G and H.

Mr. Walzer: It is stipulated that photostats or photostatic copies may be introduced and substituted in place of all exhibits offered by the plaintiff.

You may inquire, sir.[52]

Cross-Examination

of Howard S. Bernon by Mr. Zaller:

Q. Mr. Bernon, you reported or testified that the brandy concerned was segregated in the Rockefeller Center warehouse. Just in which way is it segregated?

A. Well, all merchandise that is in bond is kept in a lot which it comes in, because when you tax pay the Government makes you give them the bond number, the ship number that it came in, the papers, consul invoices, and so on; so you cannot mix up the merchandise.

Q. Well, was this imported as a lot of 1400 cases?

A. As a lot of 1500. There was one hundred cases sold prior to the time that Lilien ordered the merchandise.

Q. And what designation has this lot that is in storage?

A. I don't understand your question.

Q. Well, in what way is it marked or labeled or identified in the warehouse?

A. It is identified by the bond number, and also by your F. S. A. inspection and the ship number. We have just set the merchandise aside.

Q. There is no indication in the way of markings that would show the name of the Los Angeles Liquor Company on that merchandise?

A. To tell the truth I don't know. I don't know whether I was able to stop the markings off some of the cases or [53] not in time.

(Deposition of Howard S. Bernon)

Q. Well, you were talking about the markings on the cases. That means preparatory for shipment?

A. That is correct. I have never gone into the warehouse to check, to see whether they got to the point of putting them on the cases or not.

Q. In whose name is the brandy?

A. Imported Liquors Company.

Q. Do you have other merchandise stored there?

A. Yes, sir.

Q. And any other merchandise is probably in the same part of the warehouse as this merchandise?

A. It is in what they call a bonded section. Each lot of merchandise is kept separate according to the bond numbers and your I. T. entry numbers. We cannot mix them up if we want to. I mean that merchandise that is under bond is actually—partly belongs to the government and partly to us, until we pay the duties and taxes on it.

Q. Do you have any other bonded merchandise at the warehouse? A. Yes, sir.

Q. In that event isn't it likely that this merchandise is mixed up with the other merchandise that is in your name? A. No.

Q. Bonded merchandise?

A. No; the government does not permit you to do that. We have [54] to report to the government the numbers and also the movement on every case of merchandise. Therefore, we have to keep all merchandise segregated. We know, for example, that the lot of 1400 cases of Suarez is there. It is the only lot of one entry number: that is, the 1400 cases of Suarez.

(Deposition of Howard S. Bernon)

Q. Now, to get back to the letter. Now, referring to Plaintiff's Exhibit A. What is the date of that letter?

A. June 12th.

Q. You say you received it on the 14th?

A. Yes, sir.

Q. You remember how that was sent to you?

A. Special delivery air mail. It is marked on the letter too, incidentally.

Q. And the wire is dated what? I am referring to Exhibit D. A. 14th.

Q. You say that the wire arrived subsequent to the letter? A. The letter arrived first.

Q. Now, upon the receipt of the letter did you do anything?

A. Well, the letter was not the order. The letter just merely enclosed the check. That is all that it amounted to. The order, so far as I was concerned, was received on June 7th.

Q. Well, I will repeat my question. Did you do anything after receiving the letter that was dated June 12th? That is [55] Plaintiff's Exhibit A.

A. There was nothing to do, because I had made all arrangements for the shipment two days previously, or rather not two days previously, a week previously.

Q. Well, would you have continued with your preparation and the actual shipment if you had received no letter dated June 12th?

A. If we had not received it we would have shipped them. They gave us a definite order on June 7th.

Q. And when you say you got your definite order on June 7th, you refer to the telegram of June 7th, which

(Deposition of Howard S. Bernon)

was marked Plaintiff's Exhibit H, to which the defendant objected? That is correct?

A. That is correct. The letter only tended to confirm the telegram of the 7th, and also gave us the check. He evidently did not want to telegraph our money. That is not the usual procedure in business.

Q. Now, on June 29th, you wrote to the defendant? Your Plaintiff's Exhibit F. A. Yes.

Q. And inquired the reason for the cancellation. You tell us why you waited from the 14th of June to the 29th to write?

A. If I remember correctly we made some effort through Mr. Weiner to try to get the—their letter of—or rather their wire. I got that wire of June 14th rescinding the [56] order. Also I travel a good deal out of town. I left town there for a few days. Of course, I could not take care of everything.

Q. Is there any one who takes care of your business if anything like that arise?

A. Nobody writes my mail. If I am out of town they wait until I get back.

Q. But if you are out of the city how can some one get in touch with you?

A. Oh, I try to keep in touch with them when I am traveling. I still use the 'phone and wires.

Q. Do you know definitely you were out of town on the 14th, if it is the 14th, until the 29th?

A. I am quite sure I was.

Q. You say you made some effort. You mean you made some effort to see whom?

A. I made some effort to get ahold of Weiner.

(Deposition of Howard S. Bernon)

Q. The defendant?

A. No; I made some effort to get hold of Weiner.

Q. Did you ever reach Weiner?

A. Why, we have other customers. I just can't—I take care of a great many folks. I don't take care of just one account. We have other business to take care of. I am continually on the road. I am out of town 68 per cent of the time. And, of course, the check did not bounce until [57] June 27. That is when I really got angry.

Q. That is when you received your notice?

A. No; the slip is stamped June 27. That is when we received notice from the bank. That's right.

Q. That is when you really got angry. Didn't you know they might not do business with you when they mailed in their letter of the 12th?

A. I don't do business with that type of people. I am not in the practice of one day ordering and the next cancelling. When Mr. Lilien elects to telegraph you an order and in the middle of it starts cancelling,—I don't like to receive bum checks any more than anybody else does.

Q. Will you tell us the exact time of day that you received the letter?

A. It was approximately early afternoon. I could not give you the exact time.

Q. That is the Exhibit A I am referring to?

A. Approximately early afternoon.

Q. Now, did you do anything at all towards preparing the shipment of the brandy?

A. I gave my man instructions in New York, who handles that for me. It may have been the customs

(Deposition of Howard S. Bernon)

broker was given instructions and the I. T. Permit from the Federal Government.

Q. And upon what date did you do that?

A. On the 7th of June. Probably—I will take that back—[58] probably on the morning of the 8th, because I probably didn't start it into motion until—it was either the 7th or 8th at the latest.

Q. What did you do, if anything, by way of acknowledging the order from the defendant?

A. On June 9th, I wired for shipping instructions and acknowledged the order.

Q. Do you have a copy of that wire?

A. No; I haven't got it right now. I also received shipping instructions.

Q. Do you have a copy of those shipping instructions?

A. Yes; in reply to my wire.

Q. To whom was the wire sent?

A. Wire was sent to Weiner, who was acting both as our agent and as the Los Angeles Liquor Company's agent.

Mr. Zaller: I object to that and ask it be stricken.

Q. To get back to my original question, Mr. Bernon, I think I asked you: Did you communicate with the defendant company acknowledging the order?

A. I communicated with their representative.

Q. Did you send any communication to the Los Angeles Liquor Company, Inc., direct?

A. I don't remember whether I addressed the telegram which was addressed to Weiner care of the Los Angeles Liquor [59] Company, or I addressed it to his home.

(Deposition of Howard S. Bernon)

Q. But, in any event, that particular wire was addressed to Mr. Weiner? A. That is correct.

Q. Did you send any wire or write any letter to the Los Angeles Liquor Company, Inc., itself?

A. No; that was not necessary. The merchandise was ordered by Mr. Weiner who was acting as their agent.

Q. Now, can you tell us on what day you deposited the check which you received from the defendant company?

A. Check was not deposited by myself.

Q. This check is Plaintiff's Exhibit B.

A. The check was not deposited by myself. It was deposited by our banker, so I could not tell you on exactly what date they deposited the check.

Q. Well, refer to the check and see if you can tell us from the check on what date it was deposited?

A. Well, the check says, as far as I can read from the many stampings on the back of the check,—the earliest date seems to be June 16th.

Q. Is that June 16th? Oh, that is stamped on there for another purpose in connection with it.

A. It is the Federal Reserve Bank stamp.

Q. Where is your office?

A. 888 Union Commerce Building, Cleveland, Ohio.
[60]

Q. Where are the offices of the Manufacturers Trading Corporation?

A. 501 Guardian Building, Cleveland, Ohio.

Q. How far away from your office building is the office of the Manufacturers Trading Corporation?

A. One block.

(Deposition of Howard S. Bernon)

Q. You have constant dealings with the Manufacturers Trading Corporation? A. Yes, sir.

Q. That is, they deposit all of your moneys?

A. Yes, sir; that is true.

Q. Then you are constantly, or your office is constantly in touch with the Manufacturers Trading Corporation, receiving money from them, I take it, and depositing funds of yours? A. That's correct.

Q. Referring back to the matter of what was done by way of completing the order or filling the order, can you tell me just at what time or what date you gave the instructions to your representative in New York?

A. While I was in New York I gave the instructions, myself, verbally, because I telegraphed from New York. I talked to Mr. Lilien on the telephone from New York on June 5th. I was in New York for about a week there. As far as I can recall I gave instructions on the 8th. [61]

Q. Were you still in New York on the 8th?

A. Oh, yes. I was there for several days after that too.

Q. Whom did you give the instructions to?

A. Our customs brokers and office manager of our jobber in New York, who helps me in such matters like that, expedites the matters.

Q. What is the name of the expediter?

A. His name is Edward Drattler. D-r-a-t-t-l-e-r.

Mr. Walzer: I want to enter an objection to this line of questioning on the ground it is immaterial and irrelevant, all reference as to what he did.

Q. What is the address?

A. 400 Madison Avenue.

Q. New York? A. New York City.

(Deposition of Howard S. Bernon)

Q. Whom else had you communicated with?

A. I don't remember whether I communicated directly with my customs broker, or I asked Drattler to go out for me to the customs broker. His name is Happell, I think. I am not quite sure on the subject.

Q. You think this was all done about the 8th?

A. That is correct.

Q. The 8th of June, 1944?

A. Not only that, when I talked to Lilien on the 5th, he asked [62] me to please, not to sell the merchandise to anybody else; to put it aside for him. I gave instructions to my agents not to sell that merchandise, but to hold it, as it was being sold to the Los Angeles Liquor Company.

Q. If you spoke to him on the 5th, and you received information of that kind from Mr. Lillien, why is it that no letter was sent until the 12th of June by Mr. Lillien?

Mr. Walzer: I object to that.

Mr. Zaller: Pardon me. I will withdraw that.

Q. It was not sent by Mr. Lilien, but by Mr. Irven Rose.

Mr. Walzer: I still object on the ground this witness cannot possibly know why a letter was or was not sent by some one else.

A. No; I don't. I am just going to say I have no idea how they run their business out there. As a matter of fact—

(Colloquy ensued outside of the record.)

Q. Now, then, was Mr. Weiner your representative?

A. He was my representative and the Los Angeles Liquor Company representative.

(Deposition of Howard S. Bernon)

Q. But he was employed by you for the purpose of getting orders?

A. He was not employed by me; no. He was an agent working on a commission basis, as he was for other companies.

Q. You had an arrangement with him so that he could take [63] orders for you, and receive a commission on such orders as he produced?

A. The commission he would collect would be from us.

Q. That's right.

A. But in the letter of May 20th, written by Lilien to Imported Liquors Company, to my attention, he stated that Weiner is familiar with the Portugese brandy problem, and can advise me upon request of any of the dealings with the company. And incidentally Mr. Lilien had Weiner dictate the letter on his stationery, which Mr. Lilien signed.

Q. On whose stationery?

A. Los Angeles Liquor Company, Inc.

Q. Wouldn't you say the mere fact he was dealing with your representative—

Mr. Walzer: I object.

A. Why it would indicate that he had some confidence in the man.

Q. You mean that he was the agent of the Los Angeles Liquor Company?

Mr. Walzer: I object on the ground it is strictly argumentative. You don't have to answer that one.

Mr. Zaller: I want it answered for the record.

(Further colloquy ensued outside of the record.) [64]

(Deposition of Howard S. Bernon)

Mr. Walzer: You got my objection. Better read the question.

(Question read by the Reporter.)

A. Let me answer that by stating that it has been the practice in the liquor industry for the last few years for agents to represent sellers and at the same time also acting as agents for buyers, due to the fact that the buyers have been unable to get enough merchandise to satisfy their needs; and that is the general practice in the liquor industry.

Q. In this instance he was going to collect commission from you?

A. In most instances they collect the commission from the seller, but still act as an agent for the buyer. In fact, some of the agents which we have had were paid commissions when they came to us, even though they were acting as agents for certain purchasers in the country. That is the usual practice since the—since the stopping of distillation by the Federal Government for commercial use.

Q. How do you usually get your orders? Do you have order blanks, or any sort of an order form?

A. We do not have any order forms or blanks.

Q. Well, are your agents authorized to receive orders and bind you to the delivery of those orders?

A. Our agents receive orders when they send them in. Of course, in this case I talked to Lilien personally and only accept- [65] ed the order from him, as I agreed to accept the order on June 5th.

Q. Why, it is not the custom to accept the agent's order until you have confirmed it; is that correct?

A. That is usually the case.

(Deposition of Howard S. Bernon)

Q. I mean it is the case in this instance, too?

A. No; it was not, because I agreed with Lilien on the 'phone on the morning or afternoon of June 5th to accept his order, and agreed to put aside 1400 cases and not sell it to anybody else.

Q. As a result of which you never confirmed the order which you received, that you say you received from Weiner, or the order that you subsequently received on the 14th of June from Mr. Lilien—

Mr. Walzer: I object.

Q. —or Mr. Rose?

Mr. Walzer: Wait a minute. I object to the question on the ground it is based on an assumption that is not true. The witness has previously testified that he did send a wire or acknowledgment of the order requesting shipping instructions to Weiner on or about June 9th. That is in the record.

Mr. Zaller: That is a question, a matter of interpretation, whether when a wire was sent [66] asking for shipping instructions, whether that would constitute a confirmation or acceptance of the order.

Mr. Walzer: Want to reverse the question, Mort? The way the question was stated, the question was to the effect that there was no confirmation ever sent to either Weiner or any one else.

Mr. Zaller: Read the question.

(Question read by the Reporter.)

Q. (continuing) Was a confirmation, in so many words, ever sent to Mr. Lilien or the Los Angeles Liquor Company, Inc., direct?

Mr. Walzer: I object to that question. "In so many words." I don't know what you mean by that.

(Deposition of Howard S. Bernon)

Q. Did you do anything in the way of communicating with the Los Angeles Liquor Company, Inc., or Mr. Lilien direct, indicating in so many words that you accepted, had accepted his order?

A. I think to make the thing a little bit clearer for you, Lilien and I made a deal on June 5th. The only thing holding up the delivery was whether or not we could produce a photostatic copy of approval from the Food & Drug Administration. We had a deal. And I sent him a photostat, and in that letter I asked for him to wire. Instead he had his man Weiner wire me. [67]

Q. Was it customary for you to require that on any orders you received, which orders in that event would be written on the Weiner stationery or of the buyer, that the word "noncancellable" would appear thereon?

A. Would you mind repeating your question?

Mr. Walzer: Let me get an objection in on the ground it is immaterial. Now you may answer that.

(Question read by the Reporter.)

A. With some customers we do and with some we do not.

Q. Where do you draw the line?

A. Depending upon whether or not they are a new customer. How much we knew about his credit, and about his character, like any ordinary business would do.

Q. In this case was the order marked "noncancellable"?

A. Well, I could not mark it noncancellable in a 'phone conversation, nor on the telegram.

Q. How about the letter of June 12th?

A. It is not on the letter of June 12th, as far as I can see. I do not believe we asked them to put that on.

(Deposition of Howard S. Bernon)

Q. Do you also have a requirement that a check must accompany every order?

A. No. Again depending upon the customer.

Q. I mean deposit.

A. Again it would depend upon the customer. [68]

Q. Did you issue any instructions to Weiner that any order must be noncancellable and a check deposited, that the company check must accompany the order?

A. All I can remember of the case—I am speaking again from memory now, because I don't have any papers in front of me that would refresh my memory—I remember stating to Lilien on the telephone on June 5th, to send me in a check as evidence of good faith.

Q. You have copies of the warehouse receipt?

A. We don't have them. Our bankers have them, because they hold the merchandise as collateral.

Q. Can you give us a photostat of that?

A. I presume so.

Mr. Zaller: Would you object to our having that?

Mr. Walzer: No, sir.

Mr. Zaller: Let us assume that they are being introduced. I will introduce them now and have them marked as Defendant's Exhibit 1.

Mr. Walzer: This may be received in evidence. (Photostat copy of warehouse receipt, marked Defendant's Exhibit 1 for identification, is attached hereto and made a part hereof, the same as if fully rewritten herein.)

Q. Where was the brandy stored previous to June 12th? A. Rockefeller Center warehouse. [69]

Q. It is still at the Rockefeller Center warehouse?

A. Yes.

Mr. Zaller: That is all.

(Deposition of Howard S. Bernon)

Redirect Examination

of Howard S. Bernon by Mr. Walzer:

Q. Mr. Bernon, you addressed your letter of June 5th, Plaintiff's Exhibit C, to the Los Angeles Liquor Company, Inc., attention of Mr. Aaron Lilien?

A. That's correct.

Q. Who answered that letter?

A. Mr. Weiner said this would acknowledge receipt of your letter of—dated June 5th, and addressed to the Los Angeles Liquor Company. He also stated, . . . “which Mr. Aaron Lilien handed me to clear with the California Pure Food and Drug office.”

Q. You testified, Mr. Bernon, that you first wrote to the Los Angeles Liquor Company, Inc., on June 29th, after having received their wire of cancellation. What is the fact as to when you first discovered that payment had been stopped on this check? A. June 27th.

Q. So you then wrote approximately two days after you received that notice? A. Yes.

Q. Is it customary for you, Mr. Bernon, to permit the [70] cancellation of orders which are not marked “non-cancellable”?

Mr. Zaller: I object.

Mr. Walzer: Right in line with your inquiry.

A. We do not permit the cancellation of any orders any more than we cancel orders with other people that we might place.

(Telegram dated June 9th, marked for the purposes of identification, Plaintiff's Exhibit J.)

Q. Handing you what has been marked for the purposes of identification Plaintiff's Exhibit J, I ask you if you received this telegram from Mr. M. D. Weiner?

(Deposition of Howard S. Bernon)

Mr. Zaller: I object to the introduction of the wire, or of any questions in regard to it.

A. I did receive the wire.

Q. Do you know what this wire was in response to?

A. In response to a wire which I sent on the same day.

Q. What was the substance of the wire which you sent?

A. Wherein I acknowledged the order and asked for shipping instructions.

Q. Which order do you have reference to?

A. Order for 1400 cases of Suarez brandy placed by the Los Angeles Liquor Company, Inc.

Mr. Walzer: I offer Plaintiff's Exhibit J in evidence.
[71]

Mr. Zaller: What is the date of that wire?

The Witness: 9th.

Mr. Zaller: I object to it.

By Mr. Walzer:

Q. Handing you what has been marked Defendant's Exhibit 1, are you able to tell us what it represents?

A. Yes.

Q. What does Defendant's Exhibit 1 represent?

A. Defendant's Exhibit 1 is a photostatic copy of a warehouse receipt, issued by Rockefeller Center Warehouses, Inc., of New York, for the account of Manufacturers Discount Corporation dated May 26th, 1944, covering in all 1500 cases of Suarez brandy. You will notice the receipt is issued for the account of Manufacturers Discount Corporation. Manufacturers Discount Corporation is a wholly owned subsidiary of our bankers, Manufacturers Trading Corporation and conducts busi-

(Deposition of Howard S. Bernon)

ness for them in the State of New York. You will note that the upper left corner of this certificate bears the following quotation: "Reference Imported Liquor Company." 1400 cases of this brandy were subsequently segregated for the account of the Los Angeles [72] Liquor Company, Inc., in accordance with their order.

Mr. Walzer: That is all.

Mr. Zaller: That is all.

Stipulation

It is stipulated and agreed by and between counsel for the respective parties herein that the signature of the witness, Howard S. Bernon, to this deposition is hereby expressly waived; and that it is to have the same force and effect as though signed by the witness.

(Deposition closed.) [73]

Certificate

The State of Ohio,
County of Cuyahoga—ss.

I, Harry Herman, a Notary Public, in and for the State of Ohio, duly commissioned and qualified, do hereby certify that the deposition of Howard S. Bernon was taken before me on Tuesday, the 19th day of December, 1944, at the offices of E. Z. Shapiro and S. K. Walzer, 540 Guardian Building, Cleveland, Ohio, pursuant to the annexed notice and stipulations and agreement of counsel for the respective parties herein, and completed without adjournment; that the above named Howard S. Bernon was by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that the deposition, as

above set forth, was taken by me in shorthand and by me reduced to typewriting; that pursuant to the stipulation and agreement entered into between counsel for the respective parties and the witness, the signature to his deposition was expressly waived, it being agreed that the deposition when transcribed and filed by the Notary shall be of the same force and effect as though signed by the said witness.

I do further certify that I am not a relative of or attorney for any of the parties, or otherwise interested in the event of this cause. [74]

In Witness Whereof, I have hereunto set my hand and official seal this 6th day of January, A. D. 1945.

[Seal]

HARRY HERMAN

Notary Public in and for the State of Ohio.

My Commission expires 7-20-46.

Cost Bill

Attendance	\$13.00
Transcript 100 F @ 25¢	25.00
Photostats	5.00
Certification	.35
Swearing witness	.50
Postage	.74
Exhibits, marking, etc.,	5.00
Total	<hr/> \$49.50

To be taxed as costs and payable to the Plaintiff.

[Seal]

HARRY HERMAN

Notary Public

State of Ohio,
Cuyahoga County—ss.

I, Leonard F. Fuerst, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid, Do Hereby Certify That, Harry Herman before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a Notary Public, in and for said County, duly authorized by the laws of Ohio to take the same, also to make acknowledgments, affidavits and proofs, of deeds or conveyances for land, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio. Commission expires July 20, 1946.

In Testimony Whereof, I hereunto subscribed my name and affix the seal of said Court, at Cleveland, Ohio, this 8th day of Jan. A. D. 1945.

(Seal) No. N 9465 LEONARD F. FUERST

Clerk. [75]

[PLAINTIFF'S EXHIBIT A]

LOS ANGELES LIQUOR CO INC.

Distributors of 3315 East Vernon Avenue
Wines and Liquors Los Angeles 11, California
Telephone KImball 7178

June 12, 1944

Imported Liquors Company,
888 Union Commerce Building
Cleveland, 14, Ohio, U. S. A.

Gentlemen,

Purchase Order

This will be your authority to ship 1400 cases Suarez brandy at \$41.55 per case F.O.B. Atlantic Port, draft attached to bill of lading less \$1.00 per case deposit which is herein enclosed (\$1,400.00) less Internal Revenue Taxes, Duties and the additional Federal Tax.

Goods to be shipped in bond in care of the Frank P. Dow Co., 354 So. Spring St., Los Angeles, California.

Please furnish the Frank P. Dow Co., your Federal Import licenses number in the event they may require it and also please mail them the bill of lading and oblige.

Yours very truly,

Los Angeles Liquor Co. Inc.,

Irven Rose

per Irven Rose

Air Mail—Special Delivery

Enclosure (\$1,400.00 Check Deposit)

Our Bank is Bank of America, Vernon Branch,
3801 Santa Fe Ave.

Our California State Import license is L-136 G

[Written]: O. K. M. D. Weiner [76]

[PLAINTIFF'S EXHIBITS B]

Deposit on 1400 cases Suarez Brandy W 6/22/44

Los Angeles Liquor Company, Inc. No. 6565

3315 East Vernon Avenue

KImball 5188 [Payment Stopped] [N. P.]

#3 [6-4]

[Payment Stopped] Los Angeles, Calif. June 12th 1944

Pay to the

Order of Imported Liquors Company \$1,400.00

Los Angeles

*1400 Dol's .00 Cts.....Dollars

Meat Co.

90-848 Vernon Branch 90-848

Los Angeles Liquor Company, Inc.

By Irven Rose

President

Bank of America

National Trust and Savings

Association

3801 Santa Fe Avenue

Los Angeles, California

[Endorsements on Back] [77]

[PLAINTIFF'S EXHIBIT B-1]

CENTRAL NATIONAL BANK OF CLEVELAND
Cleveland, Ohio

6/26/44

We Have Charged Your Account for the Following Item
Drawn on Bank of America Branch Los Angeles Calif
Drawn by Los Angeles Liq Co Inc
Reason for Return Payment Stopped

Amount \$.....

Protest Fees \$.....

Total \$1400.00

Manufacturers Trading Corp
501 Guardian Bldg
Cleveland Ohio

[Stamped] Teller's Copy

M CL

Date.....

Received the Item Described Above [Written] V16339

[Stamped] Jun 27 1944]

[PLAINTIFF'S EXHIBIT B-2]

Returned to No.....

By Vernon

Branch No. 372

BANK OF AMERICA

National Trust and Savings Association

\$.....

Only one item to be returned on this slip.

Reason noted below marked X.

* * * * *

4 X Payment stopped [78]

* * * * *

[PLAINTIFF'S EXHIBIT C]

June 5th, 1944

Los Angeles Liquor Co., Inc.

3315 Vernon Avenue

Los Angeles 11, Cal.

Attention: Mr. Aaron Lilien

Gentlemen:

Enclosed please find photostat of approval on a shipment of brandy which recently arrived in this country, by Federal Security Agency Food and Drug Inspection Station. Of these 1500 cases there are 1400 left and I will hold them for you for the next few days as per our telephone conversation of today. In view of the fact that this merchandise has been passed already it will not be necessary to submit it to the Federal Government for further inspection when it arrives in California. You certainly will not have any trouble on this lot if the State also makes an inspection.

Please wire me as soon as you know whether or not you desire these 1400 cases Suarez Brandy. Incidentally, the strip stamps are already affixed and shipment can be made immediately.

Yours very truly,

Imported Liquors Company
Howard S. Bernon

Managing Partner

HSB/ds

Encl. [79]

[PLAINTIFF'S EXHIBIT D]

WESTERN UNION

* * * * *

1944 JUN 14 PM 4 25

AB49

SA445 34—LOS ANGELES CALIF 14 124OP
IMPORTED LIQUOR CO—

888 UNION COMMERCE BLDG CLEVE—
IRVEN ROSE WHO PLACED ORDER WITH YOU
FOR 1400 CASES FUAREZ BRANDY SOLD HIS
INTEREST IN LOS ANGELES LIQUOR COM-
PANY NO LONGER WITH US PLEASE CANCEL
ORDER AND RETURN DEPOSIT CHECK AND
OBLIGE CONFIRM—
1400. AARON LILIAN. [80]

[PLAINTIFF'S EXHIBIT E]

LOS ANGELES LIQUOR CO. INC.

Distributors of	3315 East Vernon Avenue
Wines and Liquors	Los Angeles 11, California
	Telephone KImball 7178

20 May 1944

Imported Liquors Co.,
888 Union Commerce Bldg.,
Cleveland, Ohio

Dear Mr. Bernon:

With regards to Imported Portugese Brandies, please
be advised that in California Mr. Milton P. Duffy, Chief,
Bureau Food & Drug Inspection has quarantined a con-

siderable quantity that was purchased, both on a direct basis and in bond, Philadelphia, by various firms in California and upon arrival of which, some of the Brandy in question was found adulterated as containing glass and other foreign material, same being in violation of the California health and safety code. The Department, therefore, decided that the following procedure be carried out:

1. A representative number (12) of the Brandy in question is to be submitted to a glass expert for examination to determine whether or not the bottle is suitable for use for the packaging of brandy. These representative samples shall be taken at random from your lot by an inspector of this Department.

2. A copy of the report from the glass expert must be submitted to this Department before authorization will be given for the filtering and rebottling of the Brandy.

3. If the bottle is found suitable for repackaging, the sample must be rinsed and cleaned before the filtered brandy is contained therein. If the bottle is found to be defective, the brandy must be filtered and bottled in new, clean bottles.

It will, therefore, be necessary to send in a written request for authorization to use the above described procedure for any shipments of Imported Portugese Brandies into the State of California.

In view of the above, and if you still think that your Brandy will pass the necessary inspection, and upon receipt of advice from you, that you are willing to accept

an order on this basis, we will be happy to hand one over to your Representative, Mr. Morris D. Weiner, who incidentally is familiar with our Portugese Brandy problem and can further advise you, upon request.

Yours very truly,

Los Angeles Liquor Co. Inc.

MDW:jrw

Per Aaron Lilien

Dictated by M. D. Weiner

Aaron Lilien [81]

[PLAINTIFF'S EXHIBIT F]

Copy

June 29, 1944

Los Angeles Liquor Co., Inc.,
3315 East Vernon Avenue,
Los Angeles, California (11).

Attention Mr. Aaron Lilien.

Gentlemen:

We were, indeed, surprised to receive your telegram dated June 14, attempting to cancel your order for 1400 cases Suarez Brandy, on the ground that Mr. Irven Rose "sold his interest in Los Angeles Liquor Company". We were all the more surprised this morning to receive returned to us unpaid your \$1400.00 check, dated June 12. and marked "Payment Stopped".

This order was placed by your company in good faith and was taken by us in good faith. We can not understand what relationship to this matter has the sale by Mr. Rose of his stock in your company. The corporation is still liable for its debts, isn't it? In addition, it should be noted that it was you personally who corresponded with us about this merchandise, and wrote to us on May 20,

1944, offering to place the order through Mr. Morris D. Weiner.

Some of our friends among the liquor wholesalers, indeed, have a very funny approach to business. When they want the merchandise, they will do anything to get it, but when the first cold wind blows, they will do anything to avoid taking in merchandise, even though it means the promiscuous breaking of contracts and hurting their own reputations by it. Frankly, we believe you are unduly scared by the so-called domestic distillers "holiday", which has been announced for August. This whole country will not be flooded with alcohol and whiskey by a month's distillation. I believe it is quite clear that the whiskey distillers will probably not be able to increase their allotments to wholesalers to the extent of more than ten, or at most fifteen per cent.

Under these circumstances, we suggest that you send us by air mail a new check for \$1400.00 and we will return your June 12th check, which has been marked "Payment Stopped". We will then promptly ship the merchandise to you against sight draft as agreed upon. Unless we receive your favorable reply by return air mail, we shall, of course, be compelled to turn the file over to our attorneys, with instructions to file suit against your company for the full amount due for the 1400 cases of brandy, which you purchased from us.

We do not usually force our customers to buy merchandise from us, but we do feel that one should live up to his contract, and we intend to see to it that your company does, in this instance.

Very truly yours,

Imported Liquors Company

[PLAINTIFF'S EXHIBIT G]

M. D. Weiner
15 Paloma Avenue
Venice, California
June 7, 1944

Imported Liquors Company
888 Union Commerce Bldg.,
Cleveland 14, Ohio

Attn: Mr. Howard S. Bernon

Gentlemen:

This will acknowledge receipt of your letter dated June 5, addressed to the Los Angeles Liquor Company and photostatic copy of the New York inspection No. 68041 pertaining to 1500 cases Suarez Portuguese Brandy which Mr. Aaron Lilien handed me to clear with the California Pure Food and Drug office. I will therefore- wire you the following night letter "Sold Los Angeles Liquor Company 1400 cases Suarez Brandy upon receipt of confirmation by wire or phone the Los Angeles Liquor Company will mail you 1400 dollars deposit as per your original instructions to me. advise." M. D. Weiner

Incidentally, this is the only sale that I can make for your account due to the fact that I started this deal prior to receiving an answer from Mr. J. T. Laird 111 of which I have already advised you.

Kindest regards.

Sincerely yours,

M. D. Weiner
M. D. Weiner

cc: Mr. Martin B. Lane,
Mr. J. T. Laird 111 [83]

[PLAINTIFF'S EXHIBIT H]

WESTERN UNION

* * * * *

AAO3

1944 JUN 7 PM 9 13

SA 575 NL—SANTA MONICA CALIF 7
IMPORTED LIQUORS CO—

888 7'89' :9% %34:3 ?)\$& :)3; 3—

RELET JUNE 5. SOLD LOS ANGELES LIQUOR
COMPANY 1400 CASES SUAREZ PORTUGUESE
BRANDY. UPON RECEIPT OF YOUR CONFIR-
MATION. BY WIRE OR PHONE THE LOS AN-
GELES LIQUOR COMPANY WILL MAIL YOU
\$1400.00 DEPOSIT AS PER YOUR ORIGINAL IN-
STRUCTIONS TO ME. ADVISE—

M D WEINER.

5 1400 SUAREZ \$1400.00. [84]

[PLAINTIFF'S EXHIBIT I]

FEDERAL SECURITY AGENCY
FOOD AND DRUG INSPECTION STATION

Lab. No. NY 68041

May 15, 1944

Imported Liquors Co.
888 Union Commerce Bldg.
Cleveland

Dear Sir:

The examination of your shipment of Brandy per S. S.
C/Wise S/S San Rhome Entry No. 35018 from
La Suarez Co. Ltd. Oporto 2/-/44

(Shipper or manufacturer) (Cons. invoice) (Place) (No.) (Date)

Marks and Nos. 1500 cs. has been completed and the
goods need not be further detained, insofar as section
801 of the Federal Food, Drug, and Cosmetic Act is
concerned.

Respectfully,

H. Markowitz

Acting Chief of Station. [85]

[PLAINTIFF'S EXHIBIT J]

WESTERN UNION

* * * * *

1944 JUN 9 AM 3 05

AA53

SA864 NL—SANTA MONICA, CALIF 8

IMPORTED LIQUORS CO—

888 UNION COMMERCE BLDG CLEVE—

RECEIVED WIRE SHIP IN CARE OF FRANK P
DOW CO 354 SOUTH SPRING ST LOS ANGELES
CALIFORNIA PROVIDING JUAREZ BRANDY
LABEL AND PRICE HAS BEEN APPROVED BY
WASHINGTON LOS ANGELES LIQUOR MAILING
DEPOSIT AND PURCHASE ORDER FOR 1400
CASES JUAREZ BRANDY BASIS 41.55 PER CASE
STOP I HAVE NOT YET RECEIVED AN AN-
SWER TO MY LETTER TO YOU DATED MAY
18TH WHEREIN I COMMENTED THAT 25
CENTS COMMISSION IS NOT SUFFICIENT AND
REQUEST 50 CENTS PER CASE IN ORDER HAVE
THE RECORD CLEAR SO THAT THERE CAN
BE NO MISUNDERSTANDING BETWEEN US
PLEASE CONFIRM BY WIRE OR LETTER AND
OBLIGE—

M D WEINER.

354 1400 41.55 18 25 50. [86]

DEFENDANT'S EXHIBIT NO. 1

Reference
Imported Liquor
to

Number 8051

(4)

Rockefeller Center Warehouses, Inc.
BONDED WAREHOUSE
50 Rockefeller Plaza

Entered
JF

New York, N. Y. May 26th 1944.

THIS IS TO CERTIFY that we have received in Storage Warehouse, ROCKEFELLER CENTER, 50 ROCKEFELLER PLAZA, NEW YORK, for the account of *Manufacturers District*

261 Fifth Ave Ex. G.O. # 35947 - *San Thomas Corp*
I.T. 4425

in apparent good order, except as noted hereon (contents, condition and quality unknown) the following described property, subject to all the terms, provisions, exceptions, limitations, stipulations and conditions contained herein and on the reverse hereof, such property to be delivered to their order, upon the payment of all storage, handling and other charges, compliance with the United States custom regulations and presentation of custom house permit.

Bond 35018

MARKS	NUMBERS	PACKAGES	SAID TO BE OR CONTAIN
5050/6549		One Thousand Five Hundred 1500 c/s	La Saveroy Brandy 55
		1500	

notations from book

11 full 1 BK	5869-6075 or 6073-6525-6311 5800-6380-5813-5866-5147 5825-5288-6357-6300-6385 6416-5754-5823-6015-6259 5752-6178-6083-6549-5737 5818-6057-5899-5594-5157 5859-6147-5221-5467-5347 6036-6075-5287-6529-5282 5368-6124-6430-5081-5265 5352-5090-5270-5267-5202 5155-5354-5164-5286-5841 5323-5237-5128-5520-5489 6103-6477-5325-6511-5372 6444-6091	4 full 1 out - 5267-5708-5577 10 full 2 BK 6274-5198-5331 6231-6315-5512 6149-5197-6269 5701-6534-6052 6510-6351 10 full 2 out - 5187 9 full 3 BK 5303-5871 6151-6257 6306-6245 5249-5478 6468 9 full 1 BK 2 out - 6963 8 full 4 out - 5859 6 full 6 BK 6106
--------------	--	--

NON-NEGOTIABLE

Storage $2\frac{1}{2}$ ¢ per cu ft per month
Labor $2\frac{1}{2}$ ¢ per cu ft in and out inclusive.
Charges from 4/17/44 19
Advances have been made and liability incurred on such goods as follows:

P.S. Gamage

GOODS IN BOND # 35018

OK-6016-5315
7728-6157
5110-5409
5945-5715

ROCKEFELLER CENTER
WAREHOUSES, Inc.

claims a lien for all lawful charges for storage and preservation of the goods, also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooperating and other charges and expenses in relation to such goods.

Rockefeller Center Warehouses, Inc.

By August J. Gurney

[Title of District Court and Cause.]

PLAINTIFF'S NOTICE OF MOTION FOR
SUMMARY JUDGMENT

To the defendant and to Messrs. Behrstock & Rudnick,
its *attorney*:

Please Take Notice that the plaintiff herein, on Monday, February 19, 1945, at the hour of 10:00 o'clock A. M., or as soon thereafter as the matter may be reached on the calendar, in the courtroom of the Honorable Peirson M. Hall, Federal Building, Temple and Spring Streets, Los Angeles, California, will move the Court for a summary judgment in favor of the plaintiff for the purchase price of the personal property described in the complaint, in accordance with the prayer of the complaint. [88]

Said motion will be made in accordance with Rule 56 of the Rules of Civil Procedure for the District Courts of the United States on the ground that there is no genuine issue as to any material facts and that the plaintiff is entitled to judgment as a matter of law.

Said motion will be based upon all the pleadings, records, and files of this action, upon this notice, upon the supporting affidavit of Howard Bernon served and filed concurrently herewith, and upon the deposition of Howard Bernon on file, together with exhibits attached thereto.

Dated: February 7, 1945.

EZRA Z. SHAPIRO and S. K. WALZER
and

BENJAMIN. LIEBERMAN & ELMORE,
By Aaron Elmore

Attorneys for Plaintiff. [89]

Points and Authorities

One of the rights of a vendor of personal property under a contract of sale, upon the refusal of the vendee to take the property and pay the agreed price, is "standing on the sale the vendor may retain the property for the vendee and sue for the purchase price".

Porter vs. Gibson, 25 A. C. 499 at 507 (Dec. 1944);

Cuthill vs. Peabody, 19 Cal. App. 304, at 308;

1783 Civil Code;

22 Cal. Jur. 1062, 1067.

Summary judgment should be granted if the pleadings, affidavits and exhibits show that the moving party is entitled to the relief sought.

Securities & Exch. Com. v. Payne, (DC-NY), 35 F. Supp. 873;

Securities & Exch. Com. v. Payne, (DC-NY), 35 F. Supp. 873;

Farley v. Abbetmeier, 72 App. DC 260, 114 F. (2d) 569;

Miller v. Miller, 74 App. DC 216, 122 F. (2d) 209;

Fraser v. Doing, App. DC, 130 F. (2d) 617.

The record, affidavit and deposition show without conflict that plaintiff made an offer to defendant contained in its letter to defendant of June 5, 1944 which was unqualifiedly accepted by defendant by its purchase order dated June 12, 1944. The telephone conversation of June 5, 1944 and the various telegrams and other letters pass-

ing between the parties, in various degrees confirm the offer and acceptance.

After the contract became complete by the offer and acceptance the defendant ineffectually endeavored by its telegram of June 14, 1944 to withdraw its acceptance for a reason which is now disclaimed and which, of course, can have no effect on the completed contract.

Respectfully submitted,

EZRA Z SHAPIRO and S. K. WALZER

and

BENJAMIN, LIEBERMAN & ELMORE.

By Aaron Elmore

Attorneys for Plaintiff

[Endorsed]: Filed Feb. 9, 1945. [90]

[Title of District Court and Cause.]

AFFIDAVIT OF HOWARD BERNON IN SUP-
PORT OF PLAINTIFF'S MOTION FOR SUM-
MARY JUDGMENT [91]

State of Kentucky
County of Hardin—ss.

Howard Bernon, being first duly sworn, deposes and says that the following facts are within his personal knowledge and, if he is called as a witness in the above entitled action, he can and will testify competently thereto that, at all times mentioned in the Complaint filed herein, he was a partner in Imported Liquors Company, a partnership of Cleveland, Ohio, the complainant herein;

That on or about January 2, 1945, he entered the armed forces of the United States;

That he has been engaged in the liquor business since 1934;

That on May 20, 1944, the defendant in reply to an offer made by the plaintiff sent a certain letter dated as of the same day to the defendant, agreeing to purchase the brandy from the plaintiff on the basis set forth in said letter (Plaintiff's Exhibit "E"). (Please note that all references to exhibits are to exhibits which have been made a part of the deposition of Howard Bernon, said deposition having been filed with this court in the within captioned matter.)

That on June 5, 1944, in a telephone conversation between Mr. Lilien, representing the defendant, and Mr. Bernon, all conditions of the [92] acceptance of the Los Angeles Liquor Company, dated May 20, were met and the acceptance of the Los Angeles Liquor Company order for fourteen hundred (1400) cases of Suarez Portuguese Brandy was confirmed by Mr. Bernon. In accordance with Mr. Bernon's confirmation on June 5, 1944, he mailed to the Los Angeles Liquor Company a photostatic copy of the approval of the Federal Security Food and Drug Inspection Station (Plaintiff's Exhibit "I").

That on June 7 Mr. Weiner, at the express request of the defendant, answered plaintiff's letter of June 5, 1944. This letter of June 7 (Plaintiff's Exhibit "G") acknowledged receipt of the photostatic copy of the approval, and further stated that a telegram would be sent confirming the purchase. This telegram of confirmation by the defendant was sent on June 7 (Plaintiff's Exhibit "H"). That the formal purchase order of the defendant dated June 12, 1944 (Plaintiff's Exhibit "A"), together with

the check of the defendant in the sum of Fourteen Hundred Dollars (\$1400.00) dated June 12, 1944 (Plaintiff's Exhibit "B"), were received prior to the receipt of the defendant's telegram of attempted cancellation dated June 14, 1944 (Plaintiff's Exhibit "D"). That the transaction for the purchase of fourteen hundred (1400) cases of Suarez Brandy by the defendant from the plaintiff had been consummated on June 5, 1944, and that the letter of June 7, 1944 (Plaintiff's Exhibit "G"), the telegram of June 7, 1944 (Plaintiff's Exhibit "H"), the letter of defendant dated June 12, 1944 (Plaintiff's Exhibit "A"), and the check of defendant dated June 12, 1944 (Plaintiff's Exhibit "B") are all confirmations of the fact that the transaction had been consummated and completed on June 5, 1944.

That he knows of no custom or usage in the wholesale liquor business in California or elsewhere requiring the seller to confirm any order received, but that, on the contrary, it has been the custom and usage for the seller to offer his wares by means of price lists and advertisements and any order by a purchaser constitutes an acceptance of the offer to sell.

That, on or about June 13, 1944, the liquor trade was made aware of the fact that there was to be a "liquor holiday", under the terms of which a certain amount of domestic whiskies would be made available for the market; [93] that this "liquor holiday" reduced saleability of all brands of imported brandy and more particularly the Suarez Brandy, which is the subject matter of this suit; that the Imported Liquors Company continued to offer for sale Suarez Brandy at the same price at which the defendant purchased said Suarez Brandy to the wholesale liquor market in the United States but that

the last sale of said brandy which it was able to make was on June 17, 1944, and that, subsequent to June 17, 1944, it has been unable to sell any of said brandy; that the reasonable market value of said brandy on September 22, 1944, was approximately \$5.00 per case in bond and that, as of today, the present reasonable market value of said brandy is approximately \$2.00 per case in bond.

That the letter of May 20, 1944 (Plaintiff's Exhibit "E"), addressed to the plaintiff by the defendant and signed by Aaron Lilien, bears the notation on its face that it was dictated by M. D. Weiner; that M. D. Weiner, referred to in the affidavits of Irven Rose and Aaron Lilien, answered a certain letter dated June 5, 1944, addressed to the defendant by the plaintiff (Plaintiff's Exhibit "C", Deposition of Howard Bernon filed herein), and that said M. D. Weiner acted as the agent of the defendant in responding to said letter in its behalf on June 7, 1944 (Plaintiff's Exhibit "G", Deposition of Howard Bernon filed herein).

HOWARD S. BERNON

Subscribed and sworn to before me this 30 day of January, 1945.

LeROY G. FINN

18th H. Inf. Adjutant

Received copy of the within Affidavit of Howard Bernon in Support of Plaintiff's Motion for Summary Judgment this 8th day of February, 1945. Behrstock & Rudnick, by Ben H. Rudnick, Attorneys for Defendant.

[Endorsed]: Filed Feb. 9, 1945. [94]

[Title of District Court and Cause.]

DEFENDANT'S STATEMENT IN OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT

Comes now the defendant Los Angeles Liquor Company, Inc., a Corporation, and opposes the motion of plaintiff for summary judgment upon the ground that the order of June 12, 1944, a copy of which is attached to the affidavit of Irven Rose in support of defendant's motion for a summary judgment, was not accepted by the plaintiff and notice of such acceptance given to defendant prior to defendant's cancelation thereof, and that therefore no agreement of sale existed between the parties.

That said opposition will be based upon the supplemental affidavit of Aaron Lilien attached hereto, and upon the affidavits of Irven Rose, Aaron Lilien and M. D. Weiner, and Points and Authorities attached to the *defen-tiff's* motion for a summary judgment on file in this case.

Respectfully submitted

BEHRSTOCK & RUDNICK

By Ben H. Rudnick

Attorneys for Defendant [95]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF
AARON LILIEN

State of California

County of Los Angeles—ss:

Aaron Lilien, being first duly sworn deposes and says: That the following facts are within his personal knowledge, and if he is called as a witness in the above entitled action he can and will competently testify thereto:

That either at the end of May, or the beginning of June, 1944 affiant received a long distance telephone call from a person who represented himself to be Howard Bernon of Imported Liquors Company, of Cleveland, Ohio. That said Howard Bernon told affiant that he had a shipment of brandy which had been approved by the Federal Government and asked affiant whether that would satisfy the requirements contained in affiant's [96] letter of May 20, 1944. That affiant answered that was not sufficient, because the brandy had to be passed by the California authorities in addition to the Federal Government, and that Mr. Bernon's local representative, Mr. Weiner, was familiar with the requirements of the California authorities and should be able to give him whatever information he desired.

That Mr. Bernon then asked affiant how much Suarez brandy the Los Angeles Liquor Company could use. That affiant stated he could not answer that question until he had discussed it with other members of his firm, but that in any event no consideration would be given to any order until he was convinced that the brandy would pass the California authorities.

That when affiant received the letter dated June 5, 1944 from plaintiff he contacted Mr. Weiner and handed it to him for the sole purpose of checking with the California authorities.

That affiant has been engaged in the sale of liquor at wholesale in California for a period of six years, and is acquainted with the market price of Portuguese brandy, and that the market price of Portuguese brandy has not declined since May or June of 1944.

AARON LILIEN

Affiant

Subscribed and sworn to before me this 13th day of February, 1945.

(Seal)

BEN H. RUDNICK

Notary Public in and for said County and State

[Endorsed]: Filed Feb. 15, 1945. [97]

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH SACHS IN SUPPORT
OF PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO DE-
FENDANT'S MOTION FOR SUMMARY JUDG-
MENT [98]

State of New York,
County of New York,
City of New York—ss:

Joseph Sachs, first being duly sworn according to law, deposes and says that he resides at 4508—39th Avenue, Long Island City, New York.

Affiant further states that he is the Owner of Atlantic Liquor Wholesalers, a wholesale liquor company doing business in the City of New York under appropriate Federal and State Licenses; that in connection with said business Atlantic Liquor Wholesalers has, during its fiscal year recently ended, transacted several million dollars worth of business in the sale to retail liquor stores in New York City and in other cities in the State of New York, of whiskey, brandy, gin, rum and cordials of various types, both domestic and imported.

Affiant further states that he is fully conversant with, and experienced in, the purchasing and selling of domes-

tic and imported liquors; that he is in constant and close touch with other wholesalers and importers and follows up closely the current market prices and market trends in the liquor industry.

Affiant further states that during the last year he purchased numerous cases of Suarez Brandy, imported from Portugal, and that at the present time he has in his warehouses several thousand cases of *Portugues* Brandy of several brands acquired by him from Imported Liquors Company of Cleveland, Ohio, and from other licensed importers; all of which is unable to dispose of to the retail stores or to other wholesalers, at this time, at any price, there existing practically no current active market for such merchandise.

Affiant further states that, within the last two days, he has received firm offers from a larger liquor importing and wholesaling company, with warehouse and offices in the States of New York, Connecticut, Florida and New Jersey, for the sale to Atlantic Liquor Wholesalers of approximately twelve-hundred and fifty cases of Portuguese Brandy, bottled in fifths, at \$4.00 per case, F.O.B. New York City, in Bond. The said merchandise is guaranteed to be of good quality and passed by the Pure Food and Drug Administration. Affiant further states that the aforesaid brandy offered to him at \$4.00 per case is fully comparable in quality, source, and type of packaging, to Suarez Brandy, with which he is personally familiar.

Affiant further states that he did not take advantage of the said \$4.00 per case offer, nor did he purchase the said merchandise, in view of his own knowledge and belief that the present market price and value of Suarez

and similar Portuguese Brandy, for sale by importers to wholesalers, would not exceed \$2.00 per case, plus taxes.

A true photostatic copy of the said importer's letter, dated February 6, 1945, offering Portuguese Brandy at \$4.00 per case, is attached hereto and made a part hereof.

Further Affiant sayeth not.

JOSEPH SACHS

Sworn to before me and acknowledged in my presence by the said Joseph Sachs, personally known to me, this 7th day of February, 1945, in the City of New York.

DAVID GLASSBERG

Notary Public, Qns. Co. Clk's No. 3252, Reg. No. 196-G-5
N. Y. Co. Clerk's No. 855, Reg. No. 495-G-5.

Commission Expires March 30, 1945. [99]

SEGGERMAN NIXON CORPORATION

Importers and Distillers Representatives

111 Eighth Avenue

New York

February 6th, 1945

Atlantic Liquor Wholesalers

400 Madison Avenue

New York, 17, New York

Attention: Mr. Joseph Sachs

Gentlemen:

We confirm herewith our telephone conversation in reply to your inquiry regarding our Congresso Portuguese Brandy.

We have available, for immediate delivery, the following

1,169 cases of Congresso, fifths

115 cases of Lusitana, fifths

The price of each of these brands is \$4.00 per case, in bond, f. o. b. Bonded Warehouse, New York City. The terms are net cash. This merchandise is sound and of good quality and has been passed by the Pure Food and Drug Administration.

We would be pleased to accept your order for this merchandise and look forward to the pleasure of hearing from you.

Yours very truly

SEGGERMAN NIXON CORPORATION

n

J. R. Kitrosser

[Endorsed]: Filed Feb. 19, 1945. [100]

In the District Court of the United States for the
Southern District of California
Central Division

No. 3891-PH

IMPORTED LIQUORS COMPANY, a partnership,
888 Union Commerce Building, Cleveland, Ohio,
Plaintiff

-vs-

LOS ANGELES LIQUOR COMPANY, INC., a Corporation,
3315 East Vernon Avenue, Los Angeles, California,
Defendant

JUDGMENT

Plaintiff's Motion for Summary Judgment and the defendant's Motion for Summary Judgment came on regularly for hearing before the Court, Honorable Peirson M. Hall Judge presiding, on the 19th day of February, 1945

at the hour of ten o'clock A. M., Ezra Z. Shapiro and S. K. Walzer and Benjamin, Lieberman & Elmore by Aaron Elmore, Esquire, appeared as attorneys for plaintiff and Behrstock & Rudnick, by Ben H. Rudnick, Esquire, appeared as attorneys for the defendant, and the Court having heard the argument of counsel, and having taken said matters under submission, and having examined and considered the respective Motions for Summary Judgment, and the affidavits, exhibits and depo- [102] sitions in support and opposition thereof, and being fully advised in the premises, Now, Therefore,

It Is Ordered, Adjudged and Decreed:

1—That plaintiff's Motion for Summary Judgment be and the same hereby is denied.

2—That defendant's Motion for Summary Judgment be and the same is hereby granted.

3—That judgment be entered in favor of the defendant Los Angeles Liquor Company, Inc., a Corporation, and against the plaintiff Imported Liquors Company a Partnership, consisting of Howard S. Bernon and Ruth B. Bernon, for defendant's costs herein taxed at \$24.00.

Dated this 16th day of March, 1945.

PEIRSON M. HALL

Judge

Judgment entered Mar. 17, 1945. Docketed Mar. 17, 1945. C. O. Book 31, page 371. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Mar. 17, 1945. [103]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Imported Liquors Company, a partnership, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 17th day of March, 1945, in favor of the defendant and against the plaintiff, pursuant to the order of the Court granting judgment in favor of defendant on defendant's motion for summary judgment.

Dated: April 19, 1945.

EZRA Z. SHAPIRO and S. K. WALZER

and

BENJAMIN, LIEBERMAN & ELMORE,

By Aaron Elmore

Attorneys for Plaintiff and Appellant

[Endorsed]: Filed & Mailed Copy to Behrstock & Rudnick, Attys. for Deft. Apr. 20, 1945. [104]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 111 inclusive contain full, true and correct copies of Complaint; Answer; Interrogatories to Defendant under Rule 33; Answers to Interrogatories Presented by Plaintiff under Rule 33; Defendant's Notice of Motion for Summary Judgment with Statement of Grounds and Points and Authorities and Affidavits in Support thereof; Deposition of Howard S. Bernon and Exhibits thereto; Plaintiff's Notice of Motion for Summary Judgment with Points and Authorities and Affidavit in Support thereof; Defendant's Statement in Opposition to Motion for Summary Judgment with Supplemental Affidavit of Aaron Lilien; Affidavit of Joseph Sachs in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment; Judgment; Notice of Appeal; Bond on Appeal; Designation of Record on Appeal and Statement of Points on Appeal and Designation of Appellee of Additional Records to be Included on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$17.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 8 day of May, 1945.

[Seal]

EDMUND L. SMITH.

Clerk.

By Theodore Hocke

Chief Deputy Clerk.

[Endorsed]: No. 11057. United States Circuit Court of Appeals for the Ninth Circuit. Imported Liquors Company, a partnership, Appellant, vs. Los Angeles Liquor Company, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed May 10, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11057

IMPORTED LIQUORS COMPANY, a partnership,
Plaintiff and Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Defendant and Appellee.

DESIGNATION OF RECORD ON APPEAL AND
STATEMENT OF POINTS ON APPEAL

To the defendant and appellee above named and to the
Clerk of the above-entitled court:

* * * * *

STATEMENT OF POINTS ON APPEAL

A concise statement of the points on which plaintiff
and appellant intends to rely on the appeal is:

The Court erred in granting the motion of the defendant for summary judgment and in rendering and entering judgment thereon.

Dated: May 7, 1945.

EZRA Z. SHAPIRO and S. K. WALZER
and

BENJAMIN. LIEBERMAN & ELMORE.

By Aaron Elmore

Attorneys for Plaintiff and Appellant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 10, 1945. Paul P. O'Brien,
Clerk.

